IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| In re<br>**PETER SAKARIAS,**<br><br>In re<br>**TAUNO WAIDLA,**<br><br>On Habeas Corpus. | **DEATH PENALTY CASES**<br>S082299 and S102401<br>(consolidated) |

Los Angeles County Superior Court No. A711340
The Honorable Thomas L. Willhite, Jr., Judge

# RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS


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## PRELIMINARY STATEMENT

In separate trials, petitioners Peter Sakarias and Tauno Waidla were convicted of, among other charges, first-degree murder with robbery and burglary special circumstances, based on evidence that they used a knife and a hatchet to stab, chop, and bludgeon Viivi Piirisild to death inside her North Hollywood home. In each case, the jury determined the appropriate penalty to be death, and the trial court entered a judgment imposing the death sentence. On direct appeal, this Court affirmed the judgment of conviction and the penalty of death as to both petitioners. (*People v. Waidla* (2000) 22 Cal.4th 690; *People v. Sakarias* (2000) 22 Cal.4th 596.)

On September 20, 1999, Sakarias filed a petition for writ of habeas corpus in this Court in case number S082299, challenging his conviction and death sentence. On November 4, 1999, this Court requested that respondent file an informal response to the petition pursuant to Rule 60 of the California Rules of Court. After the response was filed, this Court issued an order to show cause (OSC) limited to the issue of why relief should not be granted on the grounds "that the prosecutor presented false evidence and argument, and presented facts inconsistent with those presented at a previous trial. . ." Respondent filed a return to the petition on November 20, 2001. Sakarias subsequently filed a traverse.

On November 27, 2001, Waidla filed a petition for writ of habeas corpus in this Court in case number S102401, challenging his conviction and

death sentence.[1/] On December 5, 2001, this Court requested that respondent file an informal response to the petition pursuant to Rule 60 of the California Rules of Court. After the response was filed, this Court issued an OSC limited to the issue of why relief should not be granted on the grounds "that the prosecutor presented false evidence and argument, and presented facts inconsistent with those presented at a previous trial," and the issue of whether a claim based on *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694], should be cognizable on habeas corpus. Respondent filed a return to the petition on September 10, 2002. Waidla subsequently filed a traverse.

On January 15, 2003, this Court consolidated the two habeas cases and ordered the Honorable Robert A. Dukes, Presiding Judge of the Los Angeles County Superior Court, to select a judge to sit as a referee for a reference hearing. This Court ordered the referee to make findings of fact on the following questions:

1. Was prosecutor Steven Ipsen's argument of inconsistent factual theories to the juries in the trials of petitioners Waidla and Sakarias intentional or inadvertent?

2. (a) Did Ipsen believe, at the time of Sakarias's trial, that the murder victim, Viivi Piirisild, was already dead at the time she was dragged from the living room to the bedroom? (b) Did he have reason to believe Piirisild was dead when moved to the bedroom?

3. At Sakarias's trial, did Ipsen deliberately refrain from asking the medical examiner, Dr. James Ribe, about a postmortem abrasion on the victim's back?

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1. Waidla had previously filed a petition for writ of habeas corpus in this Court in case number S076438. This Court denied that petition on April 6, 2000.

4. At Waidla's trial, did Ipsen refrain from seeking admission of Sakarias's confession into evidence because it contradicted the factual theory he intended to argue to the Waidla jury?

Pursuant to this Court's order, a reference hearing was held on October 28, 2003, before Los Angeles County Superior Court Judge Thomas L. Willhite, Jr. On December 16, 2003, the referee's report and findings of fact were filed in this Court. The referee summarized the findings as follows:

1. Ipsen's argument of inconsistent factual theories to the juries in the trials of Waidla and Sakarias was an intentional and strategic decision designed to fit the evidence Ipsen presented at the successive trials to meet the proffered defense theories, and to maximize the portrayal of each defendant's culpability.

2. (a) At the time of the Sakarias trial, Ipsen did not believe that Piirisild was already dead when she was dragged from the living room to the bedroom. (b) At the time of the Sakarias trial, Ipsen had strong reason to believe that Piirisild was dead when she was dragged from the living room to the bedroom. Although Ipsen also had some lesser reason to believe she may have been alive, the great weight of the evidence did not support that view. Further, as explained below in Issue No. 3, Ipsen intentionally did not elicit testimony from Dr. Ribe about the postmortem abrasion on Piirisild's back, because the most likely interpretation of the abrasion was inconsistent with the theory of the killing Ipsen presented at Sakarias's trial.

3. Ipsen deliberately refrained from asking Dr. Ribe about the postmortem abrasion on Piirisild's back. He did so to tailor his evidentiary presentation to his changed theory of the hatchet wounds. The most likely explanation of that abrasion would have been inconsistent with the factual theory of the killing he presented in Sakarias's trial.

4. Ipsen believed that Sakarias's confession was inadmissible at Waidla's trial. For that reason, and not because it contradicted the factual

theory he intended to argue to the Waidla jury, he did not offer it against Waidla.

After the referee's report was filed, this Court invited the parties to serve and file exceptions to the report of the referee and simultaneous briefs on the merits. As set forth below, respondent does not take exception to the factual findings of the referee's report, but submits that neither petitioner is entitled to relief based upon the prosecutor's inconsistent argument concerning the three sharp-edged hatchet wounds at the separate but related trials of each petitioner.

## STATEMENT OF FACTS

Petitioners Tauno Waidla and Peter Sakarias defected from the Soviet Army and moved to the United States in 1987. Because Avo and Viivi Piirisild were heavily involved in an organization seeking independence for the Baltic States, they invited Waidla to live with them in their North Hollywood home and gave him financial support. When Waidla attempted to extort additional money from the Piirisilds approximately one year later, Viivi demanded that he move out of her house.

After burglarizing the Piirisilds' Crestline cabin, Waidla and Sakarias broke into their North Hollywood home and murdered Viivi in a vicious attack using a knife and a hatchet that they had taken from the cabin. Viivi died from a combination of blunt force trauma, knife wounds, and chopping wounds. No particular wound could be isolated as the cause of death.

With Viivi lying in a nearby bedroom, Waidla and Sakarias ate some food in the Piirisilds' kitchen. They then sold Viivi's jewelry at a pawn shop before using her credit cards to fly to New York and purchase clothes and jewelry for themselves.

Upon their arrest in New York near the Canadian border, both petitioners initially denied any involvement in Viivi's death before subsequently making damaging admissions. Specifically, Waidla ultimately told homicide detectives that he had initiated the attack by striking Viivi with the blunt end of the hatchet. Similarly, Sakarias told the detectives that he had stabbed Viivi in the chest with a knife until the handle broke and that he later struck her in the head twice with the hatchet.

## A. Sakarias's Trial[1/]

### 1. Summary Of The Proceedings

In the guilt phase of Sakarias's trial, the prosecution presented evidence that Waidla and Sakarias jointly attacked and killed Viivi. Among other evidence, the prosecution introduced Sakarias's admission that he stabbed Viivi with a knife in the chest until the handle broke and then subsequently struck her twice with a hatchet that Waidla had given him to make sure that she was dead. (Sakarias RT 1282-1286.)

The defense presented no evidence in the guilt phase. (Sakarias RT 1411-1412.) During argument, defense counsel conceded that Sakarias was guilty of premeditated murder, but asserted that the special-circumstance

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2. For a more detailed summary of the evidence presented at Sakarias's trial, please refer to pages 3-22 of the Respondent's Brief filed in the automatic appeal (No. S024349).

allegations should be rejected because the theft was incidental to the murder. (Sakarias RT 1537-1552.)

In the penalty phase, the prosecution presented evidence that Sakarias possessed a firearm at the time of his arrest and twice possessed shanks while in custody awaiting trial. The first time shanks were found in his possession, Sakarias stated that he planned to cut the throats of three fellow inmates. The second time shanks were found in his possession, Sakarias also had a paper clip that had been modified in an apparent attempt to create a device for unlocking handcuffs. (Sakarias RT 1772-1777, 1786-1789, 1835-1852.)

After the defense presented evidence that Sakarias suffered from a mental disorder, that he had received positive evaluations at work, and that his parents wanted his life to be spared (Sakarias RT 1860-1861, 1945-1951, 2362), the prosecution countered with evidence that Sakarias showed no signs of remorse in comments he made to the bailiff throughout the trial (Sakarias RT 2368-2376). Specifically, the bailiff testified that Sakarias complained about the Piirisilds and announced that he had also wanted to kill Avo. The bailiff further testified that Sakarias told him that "Avo was going to get what's coming to him." (Sakarias RT 2368-2376.)

### 2. Evidence Concerning The Victim's Wounds

The only direct evidence as to which petitioner inflicted which wound came from Sakarias's statement to the homicide detectives. In his statement, Sakarias said that Waidla struck Viivi in the head with the hatchet after she entered her front door. According to Sakarias, Waidla struck her a second time even though she promised to give him anything he wanted if he stopped hitting her. Sakarias then described how he joined the attack and stabbed Viivi four or five times with a knife until the handle broke. Sakarias further stated that, after dragging Viivi into the bedroom, he struck her on the head twice with the hatchet before returning to the kitchen to eat some of her food. (Sakarias RT 1225-1230, 1282-1286.)

Detectives David Crews and Victor Pietrantoni testified concerning the scene of the homicide. They found blood stains on the floor in the living room and entrance to the hallway. Moreover, blood splatter was found on the wall where the living room connected with the hallway. A trail of smeared blood and drag marks went down the hallway to the bedroom, where Viivi's corpse was found. (Sakarias RT 858-870, 874-879.)

Viivi's body had multiple stab wounds caused by a knife and chopping wounds caused by a hatchet. Finding more blood splatter in the bedroom, Detective Pietrantoni opined that Viivi sustained several chopping wounds after being dragged into the bedroom. (Sakarias RT 885-895, 902-911, 918.)

Dr. James Ribe performed an autopsy on Viivi. Viivi had been stabbed in the left chest area four times by a single-edged knife, with two of the stab wounds striking vital organs as they penetrated six inches deep. Viivi also sustained one hemorrhagic and two nonhemorrhagic chopping wounds to the head. Viivi had a depressed skull fracture, and she showed signs of numerous blunt force impacts that knocked her teeth out and resulted in fractures to a number of bones on the left side of her face. Finally, Viivi suffered several blows to the neck and a shattered larynx. Dr. Ribe opined that a hatchet could have caused the blunt force impacts and the chopping wounds. (Sakarias RT 1322-1323, 1330-1336, 1345-1350, 1356-1367, 1377, 1385-1398.)

**3. The Prosecutor's Argument Concerning The Wounds**

The trial prosecutor, Los Angeles County Deputy District Attorney Steven Ipsen, argued that Sakarias and Waidla jointly planned and committed the murderous assault. (Sakarias RT 1510-1511, 1567-1571.) He compared them to a right and a left hand working together. (Sakarias RT 2440-2442.) With respect to the victim's wounds, Ipsen argued that Waidla inflicted the blunt force impacts and that Sakarias inflicted the stab wounds. (Sakarias RT 1518-1520.) Ipsen further argued that Sakarias inflicted all three of the sharp-edged chopping wounds. (Sakarias RT 1520-1522.)

## B. Waidla's Trial[1/]

### 1. Summary Of The Proceedings

In the guilt phase of Waidla's trial, the prosecution presented evidence that Waidla and Sakarias jointly attacked and killed Viivi. Among other evidence, the prosecution introduced Waidla's admission that he had initiated the assault by striking Viivi with the blunt end of the hatchet and that Sakarias then began stabbing her. (Waidla RT 2317-2335.) The prosecution also introduced evidence that Waidla's fingerprints were found inside the house where the forced entry occurred. (Waidla RT 1333-1335, 1394.)

The defense attempted to make identity an issue. Waidla denied any involvement in Viivi's death and claimed that he falsely told homicide detectives that he participated in the murder out of a fear that they would assault him if he refused to confess. (Waidla RT 2438-2444, 2460-2468.) But Waidla admitted that, at the time of his arrest, he possessed a firearm and a letter he had written that stated he would prefer to "croak" with a weapon rather than be "taken alive" by the authorities. (Waidla RT 2034-2038, 2441-2444, 2690-2704.)

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3. For a more detailed summary of the evidence presented at Waidla's trial, please refer to pages 3-26 of the Respondent's Brief filed in the automatic appeal (No. S020161).

In the penalty phase, neither the prosecution nor the defense presented any evidence. Both sides relied upon the evidence adduced at the guilt phase. (Waidla RT 3043-3044.)

**2. Evidence Concerning The Victim's Wounds**

The only direct evidence as to which petitioner inflicted which wound came from Waidla's statement to the homicide detectives. In his statement, Waidla said that he had initiated the attack by striking Viivi in the head with the blunt end of the hatchet as she walked through the front doorway. According to Waidla, Sakarias then began stabbing her with a knife. Waidla explained that sometime later he gave the hatchet to Sakarias and went into the kitchen while Sakarias went into the bedroom. (Waidla RT 2331-2335.)

Detectives Crews and Pietrantoni testified concerning the scene of the homicide. They found blood stains on the floor and blood splatter on the wall to the living room near the front door and inside the bedroom. A trail of smeared blood and drag marks followed the hallway to the bedroom where Viivi's corpse was found. (Waidla RT 1797-1807, 1847, 1882, 1956-1975, 1979-1983.)

Dr. Ribe testified as to the wounds Viivi sustained. According to Dr. Ribe, Viivi died from multiple traumatic injuries that included "numerous stab wounds, chop wounds, and blunt force injuries." (Waidla RT 1502, 1653-1654.)

As Dr. Ribe described, Viivi had been stabbed in the left chest area four times by a single-edged knife, with two of the stab wounds striking vital organs as they penetrated six inches deep. Viivi also sustained one hemorrhagic and two nonhemorrhagic chopping wounds to the head. Viivi had a depressed skull fracture, and she showed signs of numerous blunt force impacts that knocked her teeth out and resulted in fractures of all of the facial bones on the left side of her face. Finally, Viivi suffered several blows to the neck and a shattered larynx. Because a hatchet has one blunt side and one side with a blade, Dr. Ribe opined a hatchet could have caused the blunt force impacts and chopping wounds. (Waidla RT 1497, 1502-1506, 1509, 1522, 1528, 1534, 1541, 1552-1558, 1565-1566, 1580-1581, 1608-1609, 1614-1616, 1627, 1636-1642, 1653-1654.)

Dr. Ribe further testified that Viivi had a postmortem abrasion on her lower back. Dr. Ribe explained that the abrasion was consistent with someone dragging Viivi's body across a carpeted area. (Waidla RT 1631-1633, 1650-1652.)

**3. The Prosecutor's Argument Concerning The Wounds**

Ipsen argued that Waidla and Sakarias jointly planned and committed the murderous assault. (Waidla RT 2816-2818, 2825-2827, 2830, 3059-3062.) He compared them to a right and a left hand working together. (Waidla RT 2816, 2821, 2825.) With respect to the victim's wounds, Ipsen argued that Waidla inflicted the blunt force impacts and that Sakarias inflicted the stab

wounds. (Waidla RT 2840-2843.) Ipsen further suggested, without expressly arguing, that Waidla inflicted all three of the sharp-edged chopping wounds. (Waidla RT 2835-2838, 2843, 2921-2922, 2956, 3068-3070.)

## C. Reference Hearing

### 1. Evidence Presented By Respondent

In response to Question No. 1 posed by this Court, Ipsen conceded that his argument at the two trials was inconsistent as to whether Waidla or Sakarias personally inflicted the hemorrhagic chopping wound, but he denied making any inconsistent argument concerning the two nonhemorrhagic chopping wounds. As to the latter two wounds, Ipsen denied arguing during the Waidla trial that they were inflicted by Waidla. (Hrg. RT 61-62.) As to the hemorrhagic chopping wound, Ipsen testified the inconsistency was inadvertent, not intentional. (Hrg. RT 21, 42-43.) According to Ipsen, he handled numerous other cases during the eight or nine months that passed between the end of the Waidla trial and the beginning of the Sakarias trial. (Hrg. RT 10-11.) Moreover, Ipsen explained that he approached the two trials differently since the proffered defenses were different with Waidla denying responsibility completely and Sakarias acknowledging responsibility for murder while challenging the special-circumstance allegations and raising questions as to his mental state. As such, Ipsen did not emphasize or focus on the circumstances of the homicide during the trial of Sakarias. (Hrg. RT 11-15, 25.)

In response to Question No. 2, Ipsen testified that he did not recall ever thinking about the timing of the victim's death when he handled the Sakarias trial. (Hrg. RT 31.) Nevertheless, Ipsen testified it was unknowable whether

the victim was alive or dead when she was moved to the bedroom by Waidla and Sakarias. (Hrg. RT 23-24.) As evidence the victim was alive at the time, Ipsen cited: the amount of blood splatter in the bedroom was consistent with three chopping wounds, rather than two; and the three chopping wounds were consistent with one person inflicting them from a single location, bringing the hatchet down at the same angle. (Hrg. RT 28-30.) As evidence the victim was dead at the time she was moved, Ipsen cited the postmortem abrasion on the victim's back and Sakarias's statement that he had inflicted only two chopping wounds. (Hrg. RT 31-32, 53-54.)

In response to Question No. 3, Ipsen testified that, during the trial of Sakarias, he did not deliberately refrain from asking the deputy medical examiner about the abrasion on the victim's back. Ipsen explained that his examination of the deputy medical examiner was much shorter in the trial of Sakarias in light of the proffered defense. (Hrg. RT 34-35, 43-44.)

In response to Question No. 4, Ipsen testified that his failure to seek admission of Sakarias's confession during the trial of Waidla was not based on any desire to argue inconsistent theories. Ipsen explained that he would have wanted to introduce the co-perpetrator's confession but did not believe it would have been admissible. (Hrg. RT 35-37.)

### 2. Evidence Presented By Sakarias

In 1991, Billy Webb was the head deputy of the San Fernando branch of the Los Angeles County District Attorney's Office. Upon being shown a "Special Circumstances/Penalty Disposition" memorandum that he and Ipsen purportedly sent to the Chief Deputy District Attorney concerning Sakarias on May 21, 1991, Webb testified that he had no specific recollection concerning the memorandum, which requested authorization to extend an offer of life imprisonment without the possibility of parole based, in part, on the following:

> The defendant's confession, corroborated by physical evidence, indicates that he wielded the knife, while Waidla used the hatchet. It is my opinion that the defendant became involved in the attack at the command of Waidla after the victim was rendered unconscious by Waidla's hatchet blows to the head.

(Hrg. RT 145-147, 160; Hrg. Ex. I.)

### 3. The Referee's Findings

The referee found that the prosecutor argued during Waidla's trial that Waidla inflicted all three sharp-edged hatchet wounds and then subsequently argued during Sakarias's trial that Sakarias inflicted the very same chopping wounds. (Rep., p. 26.) According to the referee, the inconsistent arguments resulted from "an intentional strategic decision" designed "to maximize the portrayal of each defendant's culpability." (Rep., p. 22.) The referee further found that, during the Sakarias trial, the prosecutor intentionally failed to

question the deputy medical examiner about a postmortem abrasion on the victim's back because it would have been inconsistent with the factual theory he presented at that trial. (Rep., p. 29.)

With respect to the prosecutor's personal beliefs, the referee found that Ipsen always believed "Sakarias inflicted hatchet wounds in the back room." (Rep., p. 24.) Although the referee found the prosecutor had "strong reason" to believe the victim was dead when she was dragged to the bedroom, the referee expressly found that the evidence was "not entirely conclusive" and that the prosecutor did not know or believe that the victim was dead when she was dragged to the bedroom. (Rep., pp. 27-28.) Finding that the victim was very likely dead at the time she was moved to the bedroom (which would suggest Waidla inflicted the hemorrhagic chopping wound since he initiated the attack with the hatchet in the living room), the referee found that consideration of the placement and angle of the three chopping wounds as well as the blood splatter in the bedroom, left open the possibility that Sakarias inflicted "all three chopping wounds at relatively the same time" in the bedroom. (Rep., p. 28.)

## ARGUMENT

### I.

### PETITIONERS ARE NOT ENTITLED TO RELIEF BASED UPON THE PROSECUTOR'S INCONSISTENT ARGUMENTS CONCERNING THE THREE SHARP-EDGED HATCHET WOUNDS

A prosecutor is prohibited from knowingly presenting false evidence at trial and must not allow it to go uncorrected when it appears. Although the prosecution is also precluded from making a false argument by arguing something known to be untrue, a prosecutor is otherwise entitled to argue, at the separate trials of two or more defendants, factually inconsistent theories of the same criminal events.

Here, following a reference hearing ordered by this Court, the referee found that the prosecutor was deliberately inconsistent in asking Waidla's jury to infer that Waidla personally inflicted all three of the sharp-edged hatchet wounds before subsequently asking Sakarias's jury to infer that Sakarias inflicted the very same chopping wounds. The referee further found that, during the Sakarias trial, the prosecutor intentionally failed to elicit evidence that would have undercut his theory that Sakarias inflicted all three of the chopping wounds. But, as set forth below, neither petitioner is entitled to relief based on the referee's findings.

Although Sakarias seeks a new penalty phase, he is not entitled to the requested relief. The prosecutor did not introduce any false evidence against Sakarias; nor did he make any argument that he knew to be false. Sakarias actually admitted inflicting two of the chopping wounds and, as the referee's report recognizes (Rep., p. 28), the prosecutor had a basis for believing

Sakarias inflicted the third chopping wound as well. In any event, there is no reasonable likelihood that Sakarias would have obtained a more favorable penalty verdict if the prosecutor had refrained from attributing all three of the chopping wounds to Sakarias during his trial. Whether the deputy district attorney argued that those wounds were personally inflicted by Sakarias or by Waidla would have made no difference to the jury since Sakarias: personally inflicted potentially fatal knife wounds by stabbing the victim in the chest four times until the handle to the knife broke; possessed a handgun at the time of his arrest; twice possessed "shanks" while in custody awaiting trial, including one time where he also had a modified paper clip designed to unlock handcuffs; and told the bailiff he felt no remorse for the killing while expressing a desire to also kill the victim's husband.

Similarly, although Waidla seeks new guilt and penalty phases, he is entitled to neither. The prosecutor did not introduce any false evidence at Waidla's trial, and the prosecutor had a good faith basis for his argument that Waidla inflicted the hemorrhagic chopping wound. Moreover, there is no reasonable likelihood that Waidla would have obtained a more favorable guilt or penalty verdict if the prosecutor had refrained from attributing all three chopping wounds to Waidla. Whether he argued that those wounds were personally inflicted by Waidla or by Sakarias would have made no difference to the jury as to either guilt or penalty. Waidla personally inflicted potentially fatal blunt force impacts by striking the victim in the head with the blunt end of the hatchet as she entered the front door of her home. Moreover, he displayed a willingness to kill again by possessing at the time of his arrest a firearm and a letter he had written in which he expressed a desire to die with a weapon in his hand rather than be taken alive by the authorities.

### A. Inconsistent Argument At Separate But Related Trials Is Permissible Provided A Prosecutor Does Not Argue Something That The Prosecutor Knows To Be False

The Due Process Clause of the Fourteenth Amendment prohibits a prosecutor from knowingly presenting false evidence. (*Napue v. Illinois* (1959) 360 U.S. 264, 269-270 [79 S.Ct. 1173, 3 L.Ed.2d 1217].) Moreover, where a prosecution witness has testified falsely, a prosecutor cannot allow the falsity to go uncorrected. (*Ibid.* [where prosecution witness falsely testified he had not received any consideration for his testimony, prosecutor's failure to correct testimony constituted due process violation]; see, e.g., *Giglio v. United States* (1972) 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed.2d 104]; *In re Jackson* (1992) 3 Cal.4th 578, 597.)

The knowing presentation of false argument similarly violates due process where the prosecutor seeks to take advantage of some false evidence that was presented at trial. (See, e.g., *Miller v. Pate* (1967) 386 U.S. 1, 6 [87 S.Ct. 785, 17 L.Ed.2d 690]; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1015.) In *Miller*, a due process violation was found where the prosecutor allowed a witness to testify that a stain on the defendant's underwear was blood and then subsequently argued the validity of such testimony to the jury even though the prosecutor knew a forensic report conclusively established the stain was paint, not blood. Similarly, in *Brown*, a due process violation was found where the prosecutor allowed a witness to testify that the murder occurred during the course of a robbery because the victim's wallet and jewelry were missing and then subsequently argued the validity of such testimony to the jury even though the prosecutor knew the wallet and jewelry had actually been taken and later returned by the hospital staff. Thus, in both cases, the prosecutor elicited testimony from witnesses on critical issues and argued the validity of the testimony during closing argument even though he knew the testimony was not true.

In short, a prosecutor's knowing use of false evidence or argument violates a defendant's right to due process. (*People v. Sakarias, supra,* 22 Cal.4th at p. 633; see *People v. Seaton* (2001) 26 Cal.4th 598, 647.) Subject to

that prohibition, a prosecutor is entitled to argue, in separate trials of two or more defendants, factually inconsistent theories of the same criminal events. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 194; *People v. Farmer* (1989) 47 Cal.3d 888, 923; *People v. Watts* (1999) 76 Cal.App.4th 1250, 1260-1264; *People v. Hoover* (1986) 187 Cal.App.3d 1074, 1083; see also, *United States v. Powell* (1984) 469 U.S. 57, 62 [105 S.Ct.471, 83 L.Ed.2d 461] ["consistency in the verdict is not necessary"]; *Mabry v. Johnson* (1984) 467 U.S. 504, 511 [104 S.Ct. 2543, 81 L.Ed.2d 437] ["The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty"].)

In *Turner*, the defendant alleged the prosecutor committed prejudicial error by making a closing argument at his trial regarding co-perpetrator Scott's intent to kill that was inconsistent with the argument he made at Scott's earlier trial. Specifically, the defendant alleged the prosecutor argued at Scott's trial that both defendant and Scott intended to kill the victims, whereas he argued at defendant's trial that only defendant intended to kill the victims. (*People* v. *Turner, supra,* 8 Cal.4th at p. 193.) After finding the claim waived by defendant's failure to object, this Court further rejected the claim on the merits. In so doing, this Court stated, "[t]he record in this case reveals that the prosecutor's argument fairly reflected the evidence insofar as it related to *defendant's* culpability for the crimes." (*Id.*, at p. 194, emphasis in original.)

In *Farmer*, the trial court denied the defendant's request that, during closing argument, he be allowed to read excerpts from the prosecutor's summation during the prior trial of a co-perpetrator so that he could demonstrate the prosecutor was arguing inconsistent theories. Finding no error, this Court stated:

> [C]ounsel have a right to present to the jury their views on the deductions or inferences that the facts warrant. Their reasoning may be faulty, but this is a matter for the jury to decide. Even if the

> prosecutor had argued in the [co-perpetrator's] case that the evidence pointed to [the co-perpetrator's] guilt and in the present case that it suggested defendant was guilty, his argument would not be improper as long as it was based on the record and made in good faith. Defendant would have a valid complaint only if he could show the argument in his case was not justified by the evidence or was made in bad faith.

(*People* v. *Farmer, supra,* 47 Cal.3d at p. 923.)

In *Watts*, where the uncontradicted evidence established that only one perpetrator used a firearm, the prosecution took inconsistent positions at the separate trials as to which perpetrator personally used a firearm. During the prosecution of Mango Watts several years after a jury found that co-perpetrator Jonathan Shaw had used a firearm, the prosecution successfully argued that the firearm enhancement should be found true against Mango Watts. The Court of Appeal concluded that the integrity of the judicial process is not compromised by the prosecution of two individuals for the same offense where there is probable cause to support charges against each of them. The *Watts* court found the conclusion is particularly true where

> both individuals had some criminal involvement in the offense and the nature of their collective actions renders it difficult or impossible for the prosecutor to determine with certainty which individual in fact committed which particular act or crime.

(*People v. Watts, supra,* 76 Cal.App.4th at pp. 1263-1264.)[1/]

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4. In affirming the denial of Jonathan Shaw's federal habeas petition, the Ninth Circuit recently held that clearly established federal law does not preclude a prosecutor "from suggesting inconsistent interpretations of ambiguous evidence." (*Shaw v. Terhune* (9th Cir. 2003) __ F.3d __, __, [2003 U.S. App. LEXIS 25895].)

In *Hoover*, the defendant alleged that the prosecution's change of theories between the trials of two perpetrators constituted misconduct and a denial of due process. Rejecting the claim, the *Hoover* court held:

> no rule of misconduct or due process binds a prosecutor to a theory asserted in closing argument in a related prosecution. Broadly speaking, "The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury."

(*People* v. *Hoover, supra,* 187 Cal.App.3d at p. 1083, internal citations omitted.)

**B. Petitioners' Reliance On Federal Circuit Authority Is Misplaced**

Attempting to find some legal support for the proposition that a prosecutor cannot argue different theories during related trials, petitioners have relied primarily on a concurring opinion from the 11th Circuit (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1479) and the plurality opinion from a Ninth Circuit en banc decision in *Thompson* v. *Calderon* (9th Cir. 1997) (en banc) 120 F.3d 1045, 1058, reversed on other grounds *sub nom. Calderon* v. *Thompson* (1998) 523 U.S. 538 [118 S.Ct. 1489, 140 L.Ed.2d 728]. (See Sakarias Petn., at p. 57; Waidla Petn., at pp. 147-149.) However, federal circuit court decisions are not binding on California courts. (*People* v. *Zapien* (1993) 4 Cal.4th 929, 990.) Moreover, petitioners' federal authority is not persuasive.

In *Drake*, only one judge concurring in a 12-judge en banc panel said a prosecutor was not entitled to change theories.[1/] Moreover, the 11th Circuit

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5. In *Drake*, two defendants were convicted of the same murder in separate trials. The first defendant testified at his trial that he did not participate in the murder and accused the second defendant of being the

has more recently held that a prosecutor is entitled to argue inconsistent theories. (*Parker* v. *Singletary, supra,* 974 F.2d at p. 1578.)

In *Parker*, the prosecutor did not rely on any evidence that the prosecutor knew to be false. In determining the prosecutor was entitled to ask different juries to draw different inferences concerning the facts of the murder, the *Parker* court stated:

> Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries.

(*Parker* v. *Singletary, supra,* 974 F.2d at p. 1578.)

Accordingly, petitioners' reliance on *Drake* is misplaced.

Petitioners' reliance on *Thompson* is similarly misplaced. In *Thompson*, the issue arose because the prosecutor relied on inconsistent theories as to whether Thompson acted alone in killing the victim to prevent her from reporting a rape or whether the victim was killed by Thompson and David Leitch to further Leitch's personal interests. Writing for a plurality, Judge Fletcher and three other judges of the Ninth Circuit concluded Thompson's death sentence and rape-murder special circumstance should be overturned because the prosecutor relied upon fundamentally inconsistent theories. (*Thompson* v. *Calderon, supra,* 120 F.3d at pp. 1057-1059.)

Recognizing that a prosecutor has a duty to seek justice through fair tactics designed to bring forward the truth, Judge Fletcher claimed that reliance

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perpetrator. During the trial of the second defendant, the prosecutor used the testimony of the first defendant to show the second defendant actually killed the victim. In short, "inculpatory evidence that the state had discredited in a previous trial was used as essential support for the state's case." (*Parker* v. *Singletary* (11th Cir. 1992) 974 F.2d 1562, 1578 [distinguishing concurring opinion of *Drake*].)

upon inconsistent theories violates due process unless new evidence justified the change in position. Finding no consistent underlying theory, Judge Fletcher noted the prosecutor called entirely different witnesses and changed his theory as to whether Leitch was present when Thompson committed the murder. Judge Fletcher asserted that the prosecutor "manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial." (*Id.* at p. 1057.)

Finding Thompson had been prejudiced by the due process violation, the plurality said that the witnesses called at his trial, but not Leitch's, were known to be wholly unreliable. The plurality further concluded that the prosecutor appeared to rely more heavily on the theory presented at Leitch's trial (i.e., both men physically participated in the murder) because he used that theory both before and after Thompson's trial. In short, the plurality implicitly found the theory used at Thompson's trial was known by the prosecutor to be false. (*Id.* at pp. 1058-1059.)

In a concurring opinion, Judges Tashima and Thomas similarly found a due process violation because, in their view, the prosecutor's theories were fundamentally inconsistent. But they concluded that the matter should be remanded to the district court for an evidentiary hearing to determine whether Thompson or Leitch was prejudiced by the inconsistency. (*Id.* at pp. 1063-1064.)

In a dissenting opinion, Judge Kozinski explained that a prosecutor should be entitled to present mutually inconsistent theories at related trials. As Judge Kozinski recognized, a prosecutor cannot lie to a jury or present "testimony he knows, or has reason to believe, is false." But, since a prosecutor is not omniscient and may have no way of knowing which of several conflicting versions, if any, is true, he should be entitled to present both and permit the adversary process to arrive at the truth. (*Id.* at pp. 1070-1072.)

In another dissenting opinion, Judges Kleinfeld and T.G. Nelson found no due process violation occurred because there was no reason to believe the prosecutor presented evidence or a case that he knew to be false. As Judges Kleinfeld and Nelson explained, the prosecutor was entitled to ask the juries to draw conflicting inferences because both inferences were consistent with the physical evidence and the prosecutor, who was not a witness to the crime, did not know either theory to be false. (*Id.* at pp. 1074-1075.)

A review of the foregoing demonstrates that the plurality and concurring opinions would find a due process violation anytime the prosecution presented fundamentally inconsistent theories, but that the violation would be prejudicial only as to the defendant if the theory used against him was false. In contrast, the dissenting opinions would find no violation unless the theory used against the defendant was false and the prosecutor knew it was false. Thus, while *Thompson* contains differing opinions as to the significance of a prosecutor's reliance upon inconsistent theories, it is apparent that none of the judges would be willing to grant a defendant relief absent a showing that the theory used in his case was false.

Respondent submits the dissenting opinions in *Thompson* are persuasive and that a prosecutor is entitled to argue mutually exclusive theories at related trials as long as both theories are consistent with the physical evidence and the prosecutor does not know either theory to be untrue. Where a crime was committed by more than one individual, the prosecutor -- who was not present during the commission of the crime -- may not be able to ascertain which individual personally committed each of the underlying acts. Accordingly, the prosecutor should not be required to choose one theory as to how the crime was committed. The prosecutor must be allowed to argue all reasonable inferences and conclusions to be drawn from the evidence, thereby leaving such factual determinations for the jury.

In short, intentionally inconsistent argument at separate but related trials is permissible provided the prosecutor does not take advantage of any false evidence and argue something that the prosecutor knows to be false. To establish a basis for relief, a habeas petitioner should be required to establish that the prosecutor knowingly relied on a false theory or argument during his trial. Because a petitioner must show a violation of his rights, not that of a co-perpetrator or some other person, he should be required to establish that the argument used against him was known by the prosecutor to be false. Such a rule is sound because it would make little sense to find a defendant's rights could be violated by argument that was supported by the evidence and factually true. Moreover, as long as false argument was not made in bad faith with knowledge of the falsity, no violation should arise since the adversary system properly allows a jury to decide whether a prosecutor's reasoning is logical or faulty. This "knowing falsity" rule comports with fundamental fairness concerns and recognizes the respective roles of the prosecutor and the jury.

## C. Sakarias Is Not Entitled To Relief

Although Sakarias contends that the prosecutor's inconsistent theories concerning the three sharp-edged hatchet wounds warrants a new penalty phase (Sakarias Pet., pp. 56-60), he is not entitled to the requested relief. The prosecutor did not knowingly introduce any false evidence or any false argument against Sakarias. Moreover, there is no reasonable likelihood that Sakarias would have obtained a more favorable penalty verdict if the prosecutor had refrained from attributing all three chopping wounds to him.

### 1. The Prosecutor Did Not Introduce Any False Evidence Against Sakarias

In assessing whether there has been any due process violation, this Court should look first to the evidentiary portion of the trial. As set forth above, in *Miller v. Pate*, *Napue v. Illinois*, and *Brown v. Borg*, a due process violation was found where the prosecutor made a false argument that sought to take advantage of some *false evidence* that was presented at trial. (See, e.g., *Miller v. Pate, supra,* 386 U.S. at p. 6 [where stain was caused by paint, witness falsely testified that it was dried blood]; *Napue v. Illinois, supra,* 360 U.S. at pp. 269-270 [witness falsely testified he had not received any consideration for testimony]; *Brown v. Borg, supra,* 951 F.2d at p. 1015 [where hospital staff took victim's jewelry and wallet, witness falsely testified murder occurred during a robbery because those items were missing from the victim].) Moreover, as juries, including the Sakarias jury, are instructed to decide the facts based solely on the evidence (Sakarias RT 1578-1580 [CALJIC No. 1.00]) and are reminded that "[s]tatements made by the attorneys during the trial are not evidence" (Sakarias RT 1581 [CALJIC No. 1.02]), any assessment of the overall fairness of the trial should be more dependent upon the evidentiary portion of the trial than the argument of counsel.

The trial of Sakarias is immediately distinguishable from the above-listed cases because Sakarias cannot establish that any false evidence was introduced

against him. Although the referee found that the prosecutor intentionally did not ask the deputy medical examiner about the postmortem abrasion on the victim's back (Rep., p. 29), the defense had a fair opportunity to introduce such testimony since there has been no allegation of any discovery violation. Moreover, the failure to introduce evidence which might have contravened some aspect of the prosecution case is not tantamount to the presentation of false evidence. As this Court has explained,

> At trial – where the adversary system operates – the district attorney may discharge his duty by disclosing to the defendant the substantial material evidence favorable to him. The district attorney is not obligated to present such evidence at trial himself because it is defense counsel's duty to do so.

(*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 255.)

**2. The Prosecutor's Argument That Sakarias Inflicted All Three Chopping Wounds Was Made In Good Faith**

The prosecutor also did not knowingly present any false argument during the trial of Sakarias. As there were no eyewitnesses to the murder and the prosecutor did not believe the circumstances of the murder established with sufficient certainty which petitioner actually inflicted the chopping wounds, he had a good faith basis for his argument that the evidence supported the conclusion that Sakarias inflicted all three chopping wounds.

Sakarias told homicide detectives that, after the victim was dragged into the bedroom, he struck her in the head *twice* with the hatchet. (Sakarias RT 1284.) From this admission the prosecutor could infer that Sakarias was either lying[1/] or mistaken as to the number of chopping wounds that he inflicted.

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6. Aside from the fact that Sakarias made his statement while being interrogated for a capital offense, he showed a repeated desire to minimize his conduct and shift the burden to Waidla. Specifically, Sakarias initially denied any involvement in the homicide. Although he later admitted stabbing the victim and hitting her with the hatchet, Sakarias claimed that he was simply

Moreover, no statement from Waidla caused the prosecutor to rethink the inference. In speaking with the homicide detectives, Waidla never stated that he personally inflicted any of the sharp-edged hatchet wounds. While Waidla admitted that he struck the victim once with the hatchet as she entered her front door, Waidla claimed he used the blunt side of the hatchet and said that he gave the hatchet to Sakarias after they dragged the victim into the bedroom. (Waidla RT 2332-2333.)

Finally, the forensic evidence failed to convince the prosecutor that Sakarias could not have inflicted all three chopping wounds. While consideration of petitioners' statements in light of the forensic evidence supports a conclusion that Sakarias inflicted the two nonhemorrhagic chopping wounds in the bedroom after Waidla inflicted the hemorrhagic chopping wound near the front door, such a conclusion was not inescapable.

In reviewing the forensic evidence, the referee found that the best explanation for the postmortem abrasion on the victim's back was that it occurred when she was dragged to the bedroom. (Rep., p. 28.) If that was the cause, the hemorrhagic chopping wound must have been inflicted before the victim was dragged. As the statements of both petitioners indicated that Sakarias obtained the hatchet from Waidla after the victim was dragged, Sakarias might not have inflicted the hemorrhagic chopping wound.

However, in finding that petitioners had not established the prosecutor actually believed the victim was already dead when she was dragged from the living room to the bedroom, the referee left open the possibility that Sakarias inflicted all three chopping wounds in the bedroom for the reasons expressed by the prosecutor at the evidentiary hearing. There, he testified that the amount of blood splatter in the bedroom was more consistent with three chopping wounds than two and that the three chopping wounds were consistent

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following Waidla's instructions. (Sakarias RT 1212-1237, 1282-1286.)

with one person inflicting them at the same location because the angle of each wound was the same. (Rep., p. 28; Hrg. RT 28-30.) Specifically, the referee cited as a basis for believing that the victim was alive in the bedroom:

> [C]onsidering the placement and angle of the three chopping wounds, and considering the blood splatter in the bedroom, it might be possible that the same person inflicted all three chopping wounds at relatively the same time. In other words, because Sakarias confessed to inflicting two hatchet wounds in the bedroom, perhaps he actually inflicted three in the heat of his attack with the hatchet, and these three where the chopping wounds.

(Rep., p. 28.)

In short, the referee's findings establish that the prosecutor had a good faith basis for arguing that Sakarias inflicted all three chopping wounds. As a prosecutor is entitled to ask different juries to draw different inferences provided both arguments are made in good faith and not based on any false evidence, Sakarias cannot state a claim by simply showing that the prosecutor's argument regarding the wounds at his trial was intentionally inconsistent with the argument made at Waidla's trial. Because Sakarias has not established that the prosecutor knowingly introduced any false evidence or argument at his trial, he is not entitled to relief.

**3. There Is No Reasonable Likelihood That Sakarias Would Have Obtained A More Favorable Penalty Verdict If The Prosecutor Had Refrained From Attributing All Three Chopping Wounds To Him**

Where a prosecutor knowingly introduces any false evidence or argument, reversal is required if there is any reasonable likelihood that the falsity could have affected the judgment of the jury. (*United States v. Agurs* (1976) 427 U.S. 97, 103 [96 S.Ct. 2392, 49 L.Ed.2d 342].) This standard has generally been equated with the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

(*In re Jackson* (1992) 3 Cal.4th 578, 597.) Here, any falsity could not have affected the penalty verdict.

Sakarias admitted that he and Waidla jointly planned and committed the murder. (Sakarias RT 1280-1282.) Sakarias told the homicide detectives that he personally stabbed the victim in the chest four times until the handle of the knife broke and then later hit the victim in the head twice with the hatchet to make sure that she was dead. (Sakarias RT 1282-1286.) As the medical examiner opined that two of the stab wounds were potentially fatal (Sakarias RT 1397-1398), Sakarias was subject to the death penalty as an actual killer without regard to whether he personally inflicted any of the chopping wounds.

Since Sakarias was personally responsible for the potentially fatal stab wounds, it would have made no difference to the jury whether the victim was alive or already dead at the time he struck her with the hatchet in the bedroom. The import of Sakarias's admission was his thought process, not the victim's actual condition at the time. Having had an opportunity to reflect while dragging the victim to the bedroom, Sakarias displayed extreme callousness by resuming the attack on the victim because he wanted to ensure that she died. By his own admission, Sakarias's callous behavior continued as he then went into the victim's kitchen and "ate some liverwurst." (Sakarias RT 1284.) In short, without regard to whether Sakarias inflicted any of the chopping wounds, he personally inflicted some of the fatal wounds and displayed extraordinarily vicious and callous behavior.

Additionally, any change in the jury's perception as to Sakarias's exact role in the murder would not have affected the penalty verdict in light of the totality of the aggravating circumstances. Sakarias had a handgun at the time of his arrest. Moreover, "shanks" were twice confiscated from Sakarias while he was in county jail awaiting trial, including one time where he also possessed a paper clip that had been modified in an attempt to create a device that would unlock handcuffs. When questioned about the shanks, Sakarias

said that he planned to use them to cut the throats of three fellow inmates. (Sakarias RT 1786-1789, 1835-1852.) Finally, Sakarias told a bailiff during the trial that he did not feel remorse for the homicide, that he had also intended to kill the victim's husband, and that the husband was "going to get what's coming to him." (Sakarias RT 2368-2376.)

It is difficult to imagine that any human being could display such extreme callousness and such an utter lack of remorse from the moment the victim died all the way through the trial more than three years later. Under the circumstances, Sakarias would have received the same penalty even if the prosecutor had not attributed the chopping wounds to him during argument. In fact, the referee appears to make such a finding by stating,

> Undoubtedly Ipsen would have been able to make a compelling argument against Sakarias at both the guilt and penalty phases, even if Sakarias did not inflict the hemorrhagic chopping wound.

(Rep., p. 26.)

As this Court stated in finding the failure to correct false testimony harmless in *Jackson*,

> The utter lack of remorse and extreme callousness demonstrated by defendant after the crimes could not help but weigh heavily in the minds of the jury in determining the penalty.

(*In re Jackson, supra,* 3 Cal.4th at p. 600.) The same can be said for the jury who decided Sakarias's penalty. Thus, Sakarias is not entitled to a new penalty trial.

**D. Waidla Is Not Entitled To Relief**

Although Waidla contends that the prosecutor's inconsistent theories concerning the three sharp-edged hatchet wounds warrants new guilt and penalty phases (Waidla Pet., pp. 134-135), he is not entitled to the requested relief. The prosecutor did not knowingly introduce any false evidence against Waidla, and he had a good faith basis for believing that Waidla might have

inflicted the hemorrhagic chopping wound. Moreover, there is no reasonable likelihood that Waidla would have obtained a more favorable guilt or penalty verdict if the prosecutor had refrained from attributing all three chopping wounds to him.

**1. The Prosecutor Did Not Introduce Any False Evidence Against Waidla**

Waidla cannot establish that any false evidence was introduced against him. In fact, Waidla cannot even establish that the prosecutor intentionally refrained from seeking the admission of any evidence on the basis that it would have undercut his argument that Waidla inflicted all three chopping wounds. Specifically, the only evidence that Sakarias struck the victim with the hatchet came from Sakarias himself. But, as the referee properly recognized, the prosecutor did not offer Sakarias's statement during the Waidla trial because he correctly anticipated that it would have been inadmissible under *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. (Rep., p. 34.)

**2. The Prosecutor's Argument That Waidla Inflicted The Hemorrhagic Chopping Wound Was Made In Good Faith**

The prosecutor's argument that Waidla inflicted the hemorrhagic chopping wound was made in good faith. As set forth above, the postmortem abrasion provided a solid basis for the prosecutor's argument that Waidla inflicted the hemorrhagic chopping wound. If the abrasion signified that the victim was already dead when Sakarias struck her with the hatchet in the bedroom, then the hemorrhagic chopping wound must have been inflicted in the living room near the front door. Since Waidla and Sakarias both stated that Waidla possessed the hatchet and struck the victim with it in the living room, the prosecutor had a good faith basis for his argument that Waidla inflicted the hemorrhagic chopping wound.

### 3. There Is No Reasonable Likelihood That Waidla Would Have Obtained A More Favorable Guilt Or Penalty Verdict If The Prosecutor Had Refrained From Attributing All Three Chopping Wounds To Him

As set forth above, where a prosecutor knowingly introduces any false evidence or argument, reversal is required if there is any reasonable likelihood that the falsity could have affected the judgment. (*United States v. Agurs, supra,* 427 U.S. at p. 103.) To the extent the prosecutor committed misconduct or violated Waidla's right to due process by arguing contrary to his own personal belief that Waidla inflicted the two nonhemorrhagic chopping wounds (*see* Rep., p. 24), Waidla is not entitled to relief because the prosecutor's argument concerning the nonhemorrhagic wounds could not have affected the guilt or penalty verdict. Similarly, the prosecutor's argument concerning the hemorrhagic chopping wound could not have affected the guilt or penalty verdict.

The prosecutor's argument that Waidla inflicted the nonhemorrhagic chopping wounds could not have affected the murder conviction or the special-circumstance finding. Since Waidla admitted he entered the house "to get some food" (Waidla RT 2331), the ensuing homicide was necessarily a special-circumstance murder committed during the course of a burglary. The burglary/robbery special circumstances were further supported by evidence that Waidla and Sakarias pawned the victim's property and used her credit cards to fly to New York and go shopping. (Waidla RT 850-857, 1737-1751, 2079-2080.) Moreover, since Dr. Ribe opined the victim died from a combination of wounds that included the blunt force impacts that Waidla admitted he personally inflicted, Waidla was an actual killer whether or not he inflicted the nonhemorrhagic chopping wounds that may well have been inflicted after the victim was already deceased. (Waidla RT 1502, 1653-1654, 2327-2332.) In any event, the prosecution had a compelling argument that Waidla intended to kill the victim since he took a hatchet from the cabin in

Crestline, brought it into the victim's North Hollywood home, and then repeatedly struck her in the head with it when she entered her front door. (Waidla RT 1121-1130, 2327-2332.)

Moreover, the penalty verdict could not have been affected by the prosecutor's argument that Waidla inflicted the nonhemorrhagic chopping wounds. Waidla admitted personally administering the blunt force impacts that contributed to the victim's death and there was strong evidentiary support for the prosecutor's argument that Waidla inflicted the hemorrhagic chopping wound. Under the circumstances, it would have made no difference to the jury whether Waidla inflicted the nonhemorrhagic chopping wounds or handed the weapon to Sakarias so that he could inflict them, particularly since the wounds were likely postmortem.

A review of the prosecutor's argument during the penalty phase further demonstrates that his argument concerning the nonhemorrhagic chopping wounds could not have affected the penalty verdict. While the prosecutor placed some emphasis on the hemorrhagic chopping wound (Waidla RT 3069-3070), the same cannot be said for the nonhemorrhagic wounds. Without even referring to the nonhemorrhagic wounds, the prosecutor argued that the death penalty was warranted because, among other factors, Waidla: (1) committed a cold, calculated murder of woman who treated him like a mother (Waidla RT 3066); (2) was armed with firearm at the time of his arrest (Waidla RT 3065); and, (3) displayed a total lack of remorse and willingness to kill again by writing to Sakarias that he would prefer to die with a weapon in his hand than be taken alive by the authorities (Waidla RT 3065). Accordingly, Waidla is not entitled to any relief based upon the prosecutor's argument concerning the nonhemorrhagic chopping wounds.

Similarly, the prosecutor's argument as to the hemorrhagic chopping wound could not have affected either the guilt or the penalty verdict. As set forth above, Waidla was guilty of a special circumstances murder and subject

to the death penalty as an actual killer without regard to whether he inflicted any of the chopping wounds. Moreover, whether Waidla personally inflicted the hemorrhagic chopping wound or handed the hatchet to Sakarias so that he could inflict it, the jury would have sentenced Waidla to death. Displaying incredible callousness toward a person who had provided him so much assistance, Waidla initiated the murderous assault by striking the victim with a hatchet that he had taken from her cabin in the mountains. Showing no subsequent sign of remorse, Waidla displayed a willingness to kill again by possessing a firearm at the time of his arrest and a letter explaining that he would not be taken alive. Under the circumstances, the prosecutor's argument concerning the hemorrhagic wound could not have affected Waidla's penalty determination.

## CONCLUSION

For all of the reasons stated above, respondent respectfully requests this Court deny the petitions for writ of habeas corpus filed in case numbers S082299 and S102401.

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Respectfully submitted,

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